IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

O.J.APPEAL No 2 of 2000

in

COMPANY PETITIONNo 69 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE A.R.DAVE
and
Hon'ble MR.JUSTICE M.S.SHAH

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

1 & 2 Yes
3 to 5 No

KIRITBHAI HIRALAL PATEL & OTHERS
Versus
ARVIND INTEX LIMITED

Appearance:
MR MAHESH BHAVSAR for Petitioners
MR SN SOPARKAR for A & M & S SHROFF CO. for Respondent No. 1

CORAM : MR.JUSTICE A.R.DAVE
and

MR.JUSTICE M.S.SHAH

Date of decision: 16/03/2000

ORAL JUDGEMENT

(per A.R. Dave, J.)

In the present appeal the appellants have challenged the validity of an order dated 6th December 1999 passed by the learned Single Judge of this court whereby three companies, namely, Arvind Intex Ltd. ('AIL' for short), Arvind Cotspin Ltd. ('ACL' for short) and Arvind Polycot Ltd. ('APL' for short) had been ordered to be amalgamated into the transferee company, namely, Arvind Products Ltd. ('APRL' for short). By virtue of the impugned order, the scheme of amalgamation of the above named three companies into APRL had been sanctioned.

2. The appellants herein were holding 19100 shares of AIL which ultimately merged into APRL. 19100 shares of the said company had face value of Rs. 1,19,000 and the appellants had objected to the said scheme at the time when the meeting of the shareholders of AIL had been convened for the purpose of considering the scheme and they had also objected to the scheme when the said scheme was placed before the learned single Judge of this court for necessary order for sanction of the scheme.

3. The sum and substance of the objections which have been raised by the learned advocate for the appellants is that the scheme of amalgamation was not in the interest of the shareholders of AIL for the reason that the exchange ratio of shares which was accepted by the shareholders was neither fixed properly nor it was favourable to them. It has been submitted by him that at the time of giving sanction to the scheme of amalgamation, the shareholders of AIL were not conscious about their rights and they were not well informed about the scheme and in the circumstances they had given their consent to the scheme of amalgamation without understanding the nature of the scheme.

4. It has been also submitted by the learned advocate that no meeting of the creditors of AIL had been convened and therefore also the scheme of amalgamation ought not to have been sanctioned by the learned single Judge.

5. His another grievance is with regard to valuation of the assets of AIL. It has been submitted by him that

the valuation arrived at by the concerned Chartered Accountants was not just and proper and the concerned Chartered Accountants, namely, M/s. C.C. Chokshi & Co., and M/s. Bansi S. Mehta & Co., had not considered the well accepted principles of accountancy for the purpose of determining value of shares of AIL.

6. It has also been submitted by him that there was non-disclosure of certain important facts with regard to shareholding of Shri Sanjay Lalbhai who had convened the meeting of the shareholders of AIL and who is one of the directors of APRL. According to him, Shri Sanjay Lalbhai is holding substantial shares in APRL and therefore he was interested in getting AIL merged into APRL and the fact with regard to holding of shares of APRL by Shri Sanjay Lalbhai had not been revealed to the shareholders. Thus, there was non-disclosure of important and relevant facts and therefore also the scheme shouldl not have been sanctioned.

7. Lastly, learned advocate Shri Bhavsar has submitted that three companies, namely, AIL, ACL and APL, were profit making companies and the said profit making companies ought not to have been amalgamated into APRL, the transferee company, which was running into losses at the relevant time.

8. On the other hand, learned advocate Shri Soparkar appearing for the respondent company has raised a preliminary objection to the effect that the respondent company, namely, AIL, is no more in existence at this stage for the reason that the said company has already merged into APRL in pursuance of the scheme of amalgamation which has been sanctioned by the learned single Judge by his order dated 6th December 1999. It has also been submitted that necessary intimation with regard to sanction of the scheme of amalgamation has already been given to the Registrar of Companies and in pursuance of the legal formalities done in pursuance of the impugned order passed by the learned single Judge, AIL does not exist and, therefore, this appeal is not maintainable as it is against a respondent who is non-est in the eyes of law. It has been further submitted by him by way of preliminary objection that even if the appeal is allowed, it would not be possible for this court to restore the position prevailing prior to the date on which the scheme of amalgamation had been sanctioned because the three companies, namely, AIL, ACL and APL have now merged into APRL and now it would be impossible to segregate the said companies and to put life into AIL.

9. In addition to the above-referred preliminary objections, learned advocate Shri Soparkar has submitted that the objections raised by the appellants had been duly considered by the learned single Judge and as the learned single Judge did not find any substance in the said objections, ultimately, the scheme of amalgamation was sanctioned by an order dated 6.12.99.

10. We have heard the learned advocates and have also perused the relevant documents. Upon perusal of the impugned order, we have seen that the scheme was objected by Shri H.C. Shah, who was a shareholder of APL, Shri D.J. Shah, a shareholder of one of the transferor companies and the present appellants. The objections which had been raised before this court have been elaborately discussed by the learned single Judge and only after considering those objections, the learned single Judge thought it fit to sanction the scheme of amalgamation. It is pertinent to note here that when the learned advocate appearing for the appellants was asked to point out irregularities or illegalities alleged to have been committed by the learned single Judge, the learned advocate appearing for the appellants was unable to point out any illegality and irregularity committed by the learned single Judge. In spite of the said fact, looking to the judgment, we do not find any substance in the objections raised by the appellants for the following reasons.

11. It has been submitted on behalf of the appellants that the scheme of amalgamation of AIL was not just and proper and was not in the interest of the shareholders of AIL. We do not find any substance in the said argument for the reason that the scheme of amalgamation had been sanctioned at the meeting of the shareholders of AIL by a requisite majority. It is pertinent to note that 440 shareholders of AIL having shares worth Rs. 5,00,15,011 (face value) had attended the meeting of the shareholders, when the scheme in question was to be considered. Out of 440 shareholders, 419 shareholders having shares worth Rs. 4,90,70,110 were in favour of the scheme of amalgamation whereas only 15 shareholders having shares worth Rs. 7,85,651 had opposed the scheme. The votes cast by 6 shareholders having shares worth Rs. 1,59,250 were found to be invalid and, therefore, they were not considered.

12. Looking to the facts stated hereinabove, it is very clear that requisite number of shareholders had sanctioned the scheme. It is pertinent to note that the shareholders are the best persons to know whether a

particular scheme of amalgamation is in their interest. In view of the fact that the appellants are having only 19,100 shares which are worth Rs. 1.19 lakhs, we do not think that even a sizeable number of shareholders are aggrieved by the scheme of amalgamation. In the circumstances, it cannot be said that the scheme is against the interest of the shareholders. The submission of the learned advocate appearing for the appellants that the shareholders had cast their votes in favour of the scheme without understanding the proper implications of the scheme cannot be accepted. It is normally presumed that a shareholder would be knowing his interest and only after considering the relevant factors he would decide whether to cast his vote in favour of the scheme or otherwise. In the circumstances, we do not find any substance in the said objection.

13. The second objection which has been raised on behalf of the appellants is with regard to the exchange ratio. The following exchange ratio was arrived at for transfer of shares of the transferor companies and transferee company.

Transferee Co. Transferor Co.
(APRL)

4 : 7 (AIL)

1 : 1 (APL)

5 : 7 (ACL)

It has been submitted by the learned advocate appearing for the appellants that the share exchange ratio is not favourable to the shareholders of AIL for the reason that for every 7 shares of AIL, only 4 shares of APRL have been allotted under the scheme whereas for 1 share of APL, 1 share of APRL has been allotted. It has been therefore submitted by the learned advocate that the share exchange ratio is not proper and therefore the scheme ought not to have been sanctioned by the learned single Judge.

14. We do not find any substance in the submission of the learned advocate for the appellants. For the purpose of determining value of shares of a transferor or a transferee company, several factors are taken into account. Assets and liabilities of different nature are valued as per certain accounting principles. Simply because, for 7 shares of AIL only 4 shares of APRL have been allotted whereas for 1 share of APL 1 share of APRL

has been allotted, it cannot be said that the share exchange ratio is not proper. It is also pertinent to note that the learned advocate appearing for the appellants has not produced any material to show that instead of the ratio stated hereinabove, another ratio could have been adopted in the scheme. So as to show that the ratio adopted under the scheme is unreasonable, the appellants must come forward with concrete facts and valuation with regard to the assets of the transferor companies and the transferee company but the appellants have not come forward with any independent valuer's report and they have also not suggested any other ratio. It has been submitted by the learned advocate for the appellants that shares of AIL were worth Rs. 20/because the said shares were sold in the share market at that price. No evidence was adduced by the appellants to support the said say either before the learned single Judge or before this court. In absence of any material to support the said submission, we are unable to accept the said submission. In the circumstances, we do not find any substance in the said submission with regard to the share exchange ratio.

15. It has also been submitted by the learned advocate for the appellants that no meeting of the creditors was convened and consent of the creditors of the transferor companies had not been obtained before the scheme was sanctioned.

16. In reply to the said submission, learned advocate Shri Soparkar has submitted that the fact with regard to the scheme was duly advertised. The creditors of the transferor companies were informed of the proposed scheme of amalgamation. In spite of due publicity to the scheme, no creditor had objected to the proposed scheme at the relevant time. Even at the time when the scheme was being sanctioned by the learned single Judge, no creditor had raised any objection with regard to the scheme. It has been submitted by learned advocate Shri Soparkar that institutional creditors like ICICI, UTI and IDBI, who had financed the concerned companies, had given their sanction to the proposed scheme. According to learned advocate Shri Soparkar, the said fact clearly denotes that well informed and vigilant creditors like ICICI, UTI and IDBI had given sanction to the scheme of amalgamation. Moreover, he has also submitted that all the creditors of the transferor companies are to be paid their dues by the transferee company. No creditor has forgone any of its claim or has made any compromise with regard to the amount of claim and therefore, according to him, the submission made by the appellants is not just

and proper. In view of the fact that the institutional creditors named hereinabove have accorded their sanction to the scheme and as no creditor has challenged the scheme, we do not find any substance in the said submission made on behalf of the appellants.

17. With regard to the submission about valuation of the assets and liabilities of the transferor and transferee companies, it is to be noted that the appellants have not come forward with any other valuer's report. The learned advocate appearing for the appellants has made comments on the methods of valuation adopted by the chartered accountants, namely, M/s. C.C. Chokshi & Co. and M/s. Bansi S. Mehta & Co. It has been submitted by him that different methods of valuation had been adopted for valuing different assets. It has been submitted by him that for the purpose of ascertaining the value of investments, the concerned chartered accountants had taken into account market value whereas in the matter of valuation of plant and machineries, the chartered accountants had looked into the book value. This is the illustration which the learned advocate appearing for the appellants has given and he has submitted that by adopting different methods for valuing different assets, the concerned chartered accountants had not acted in accordance with certain guidelines given by the Institute of Chartered Accountants published in a book named "Study on Share Valuation" and he has therefore submitted that the valuation is not proper. We do not find substance in what has been submitted by the learned advocate for the appellants for the reason that normally different methods are adopted for valuing different types of assets. Commenting upon the illustration which has been given by the learned advocate, one can say that normally investments are valued at market value for the reason that while disposing of the investments, what the investor realises is the market value and not the book value whereas so far as the plant and machineries are concerned, normally they are not to be disposed of. They are disposed of only when the company is being wound up or the company thinks of making substantial changes in the pattern of production or when the plant and machineries have become obsolete and new plants and machineries are to be purchased. In the book "Study on Share Valuation", which has been published by the Institute of Chartered Accountants of India, and on which reliance has been placed by the learned advocate for the appellants, the following observation has been made in its Foreword to the First Edition:

"The subject of valuation of shares has always been controversial in the accounting profession. No two accountants have ever agreed in the past or will ever agree in the future on the valuation of shares of a company, as inevitably they involve the use of personal judgment on which professional men will necessarily differ........"

Thus, even an expert body of accountants is emphatically expressing an opinion that no two valuers would ever agree to a method of valuing shares. In our opinion, we cannot find any fault with the chartered accountants who have arrived at the valuation of the shares of the transferor companies and especially in view of the fact that the appellants have not placed before this court any other report of any other chartered accountants on valuation of the shares of the transferor companies. It is very easy to criticize the method of valuation adopted by somebody else. Had there been any substance in the submission which the learned advocate has made, the appellants would have come forward with another valuation report of a qualified chartered accountant, but, instead of doing so, the appellants have simply preferred to criticize the methods which were adopted by the firms of chartered accountants who were entrusted with the work pertaining to ascertaining the value of the shares.

18. With regard to non-disclosure of certain relevant facts, it has been submitted by the learned advocate for the appellants that interest of Shri Sanjay Lalbhai in APRL was not revealed to the shareholders of AIL. Upon perusal of the judgment delivered by the learned single Judge, it appears that the said fact is far from the truth. The details with regard to the shares held by Shri Sanjay Lalbhai were duly communicated to the objectors as observed by the learned single Judge in para 13 of his judgement. Thus, it is not true that there was non-disclosure of relevant facts as submitted by the appellants.

19. The submission of the learned advocate for the appellants that the profit making transferor companies have been amalgamated into a loss making transferee company is also not well founded. It is true that the company into which the three transferor companies have merged into is not a well established and profit making company. It has been submitted by learned advocate Shri Soparkar that the the transferee company is only a shell company into which the three transferor companies have merged. The said merger or amalgamation has taken place for some synergic advantages. Looking to the hugeness of

capital of the transferor and the transferee companies, a nominal loss of approx. Rs. 5 or 10 lacs by the transferee company is almost negligible. Once again we reiterate that it is always for the shareholders to decide whether they should accept a particular scheme. If the shareholders think it proper and think it advantageous to adopt a particular scheme, in our opinion, this court should not sit in appeal over the decision of the shareholders.

20. In the course of hearing, certain judgements were referred to by both the learned advocates. We are impressed by the judgment delivered in the case of Hindustan Lever Employees' Union v. Hindustan Lever Ltd. & Ors., AIR 1995 SC 470 and in the case of Miheer H. Mafatlal v. Mafatlal Industries Ltd., AIR 1997 SC 506. According to the ratio of both the judgments, it is clear that the court, while sanctioning a scheme has not to exercise jurisdiction of an appellate court. It has to exercise jurisdiction founded on fairness and it should not interfere with the wishes of the requisite number of shareholders only because the valuation figure arrived at by the valuer could have been different had some different method been used for the valuation. What is to be seen by the court is that the valuation was as per law or settled principles and was done by an independent body. The company court has not to minutely scrutinize the scheme like an appellate court for arriving at an independent conclusion. The court should interfere only if it finds that the scheme, even if sanctioned by the majority, is unconscionable, unfair or illegal. The court should not sit in appeal over the decision of the shareholders or should not impose its wisdom on the shareholders in the matter of their discretion with regard to acceptance of the scheme of amalgamation or otherwise. The court never sits in appeal to decide whether decision of a requisite majority was right or wrong.

21. Looking to the facts of the case, we do not think that the learned single Judge has committed any error or illegality while according sanction to the scheme. We are not impressed by the submissions made by the learned advocate for the appellants especially in view of the fact that he has not pointed out any error in the judgement delivered by the learned single Judge. We are also not prepared to accept the argument of the appellants that the majority of the shareholders had not understood the nature of the scheme and they had committed a blunder by accepting the scheme.

22. Looking to the facts stated hereinabove, and as we do not find any irregularity or illegality committed by the learned single Judge, we do not interfere with the order passed by the learned single Judge and this appeal is rejected with no order as to costs.

23. Learned Advocate Shri Bhavsar has submitted that implementation of this order be stayed for some time. We do not think that any fruitful purpose would be served by granting such a stay for the reason that the companies have already merged into each other as the scheme of amalgamation has already been sanctioned. It is not possible to set the clock back by making them separate

and therefore the request with regard to staying implementation of this order is not reasonable and we therefore reject it.

_____

(hn)